

IN THE SUPREME COURT OF MISSOURI

PETITION IN MANDAMUS

SC86645

STATE ex rel. ELDON BUGG

v.

THE HONORABLE ELLEN S. ROPER

RESPONDENT

**ON PETITION FROM THE CIRCUIT COURT OF BOONE COUNTY
Division III**

Case No. 01CV165364

RELATOR'S REPLY BRIEF

Eldon Bugg
88 Pawnee Ln.
Boonville, MO 65233
660/882-9305
Relator

TABLE OF CONTENTS

TABLE OF CASES	2
REPLY TO RESPONDENTS ADDITIONAL POINT RELIED ON	3
ARGUMENT	4
REPLY TO RESPONDENTS ADDITIONAL POINT I.....	4
Respondent's additional point relied on fails to show	
that venue is not proper in Boone County	
CONCLUSION.....	13
CERTIFICATES: compliance, antivirus, service.	
. 15	

TABLE OF CASES

Duvall v. Lawrence 86 S.W.3d 74 (E.D. 2002). 7

Laseter v. Griffin 968 S.W.2d 774, (S.D. 1998) 7

Error! No table of authorities entries found.§508.010 RSMo. 6

SUPREME COURT RULES:

51.045 6- 7

Error! No table of authorities entries found.

REPLY TO RESPONDENTS ADDITIONAL POINT RELIED ON

I

RESPONDENT INCORRECTLY ARGUES THAT VENUE IS PROPER IN JACKSON COUNTY BECAUSE VENUE IS PROPER IN BOONE COUNTY IN THAT (A) DEFENDANTS WAIVED VENUE BY NOT PLEADING IN THE MANNER AND FORM PRESCRIBED BY LAW, (B) EVEN WITHOUT WAIVING VENUE, TORT DAMAGE OCCURRED IN BOONE COUNTY, AND (C) RESPONDENT FAILED PROPER RESPONSE TO MANDAMUS.

State ex rel Johnson v. Honorable Stephen Griffin 945 S.W.2d 445 (banc 1997)

State ex rel. Private Nursing Service v. Romines 130 S.W.3d 28 (E.D. 2004)

Sullenger v. Cooke Sales & Svc, 646 S.W.2d 85 (banc, 1983)

ARGUMENT

REPLY TO RESPONDENTS ADDITIONAL POINT

I

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STANDARD OF REVIEW

Relator adopts standard of review set forth in Relator's Brief POINT I as though fully set forth herein.

ARGUMENTATION

In her Brief, Respondent judge Moreover, Respondent fails to oppose each of relator's specific points relied on and particularly that relator is entitled to venue in Boone County because: Respondent failed to take jurisdiction over relator's First Amended Petition, defendants' failed to plead properly, and the affect those failures have on the case at bar.

incorrectly argues that venue is proper only in Jackson County because the allegations of wrongdoing occurred there. Instead, Respondent relies on a single additional point, arguing incorrectly that venue is proper only in Jackson County because the allegations of wrongdoing occurred there, and essentially focusing on the fundamental elements of venue i.e. Missouri's general venue statute, the doctrine of when a case is 'brought', defendants' residence, and the propriety of venue.

Indeed, the parties are agreed that venue is determined by statute, that the relevant statute is § 508.010 RSMo., and that when a case is brought is a determining factor of venue law. However, the propriety of venue is not the controlling issue in this Petition in Mandamus. Rather, it is the propriety of pleading. Respondent relies on defendants' motion to dismiss pursuant to Rule 55.27, whereas Rule 55.27 does not permit challenging venue by motion. Thus, Respondent's argument on her single additional point is misplaced because A) defendants waived venue, B) regardless of waiver, venue is still proper in Boone County, and C) Brief of Respondent is improper.

A. Defendants waived venue by not pleading in the manner and form prescribed by law.

Relator has an unequivocal right to venue in Boone County because Brief for Respondent fails to show that defendants pled responsively to relator's First Amended Petition interposed as a matter of course pursuant to Rule 55.33(a), and fails to show how defendants did not waive venue. This point is argued in relator's Brief and not reargued here except to reply to Respondent's assertion that venue is not waived.

Respondent is correct in arguing that venue is not waived when made by motion. (Brief for Respondent, pg 7). However, the argument is incomplete. This court has said: “A defense of improper venue is waived if it is neither made by motion under Rule 55.27 nor included in a responsive pleading. *State ex rel. Daniel L. Johnson, v. Honorable Stephen K. Griffin*, 945 S.W.2d 445 (banc 1997). The defense must be timely raised within the time period prescribed for responding to an opposing parties pleading. *Id.*

This recitation from *Johnson* strikes at the heart of the question now before this court

whether the distinction between motions and responsive pleadings and their affect on venue

is a controlling issue in the case at bar.

Respondent fails to negate relator’s showing that a definite, legally cognizable, and procedural distinction exists between the office of motions and that of responsive pleadings. (Relator’s Brief pg. 12). Or, that an equal and controlling distinction exists between Rule 55.27 (and statutory counterpart) which permits raising defenses either by motion or responsive pleadings, and Rule 55.33 (and statutory counterpart) which only permits raising defenses by responsive pleading. Respondent fails to negate that when relator exercised his unequivocal and specific right to file his amended petition as a mater of course, Rule 55.33(a) was triggered. Respondent fails to show that defendants were not required to plead responsively to First Amended Petition. Defendants not only

failed to plead responsively, but failed even to file a motion directed to First Amended Petition choosing, instead, to rely on their original motion directed to original and abandoned petition. As such, contrary to Respondent's argument that a motion preserves venue, defendants' waiver of venue was actually caused by their failing to raise the defense of improper venue in a responsive pleading to First Amended Petition in the manner and form prescribed by law.

"When venue is waived, a court does not have jurisdiction to transfer a case on the basis of 'improper venue'". (*Johnson, 446*). Relator respectfully submits that analysis also applies to lack of jurisdiction to dismiss.

Applicable also to this case is whether some conflict exists between Rule 55.27 and Rule 51.045 as they relate to 'responsive pleadings' and 'motions'. Rule 55.27 mandates a responsive pleading for raising all defenses except for 11 enumerated defenses which can be raised by motion. Venue is no longer one of the 11 enumerated defenses. Effective January 1, 2001 Rule 51.045 became the venue-motion rule nearly contemporaneous with removal of the venue defense from Rule 55.27. Yet, the great body of citations dealing with venue pre-dates Rule 51.045 and the Rule 55.27 amendments.

Relator found no Missouri case dealing directly with whether Rule 55.27 can still be used to challenge venue by motion in light of its amendments and in light of Rule 51.045. However, two cases – one pre-dating and one post-dating Rule 51.045 – are instructive in that in both cases, the appeals courts reversed a lower court's dismissal

because the motion to dismiss was not based on one of the enumerated defenses in Rule 55.27. See *Laseter v. Griffin* 968 S.W.2d 774, (S.D. 1998) and *State ex rel Schnucks Markets v. Koehr* 859 S.W.2d 696 (banc, 1993). Since venue was not an enumerated defense of Rule 55.27 during the relevant time period of the underlying action, then neither could defendants' motion to dismiss for improper venue lie as a matter of law.

This would still be consistent, in part, with earlier cases i.e. this court holding in *State ex rel. Johnson*, 945 S.W.2d @ 446 that "A defense of improper venue is waived if it is neither made by motion under Rule 55.27 nor included in a responsive pleading" except that if decided today, wording in *Johnson* would likely read: 'A defense of improper venue is waived if it is neither made by motion under Rule 51.045 nor included in a responsive pleading'. Or, *Sullenger v. Cooke Sales & Svc*, 646 S.W.2d 85, 88 (banc, 1983) "that both venue and personal jurisdiction may be waived when a defendant makes no motion or pleading on the issues but otherwise subjects itself to the jurisdiction of the court. Add to the aforesaid, the fact that Rule 55.33(a) also mandates a responsive pleading to an amended petition and the issue becomes clear.

Defendants subjected themselves to jurisdiction of the Boone County court filing a motion directed to the original petition albeit the motion should have been a Rule 51.045 motion. Then, however, defendants made no motion or pleading to First Amended Petition. Failure to move under 51.045 or plead responsively under 55.27 or 55.33(a) waives venue and personal jurisdiction altogether. Thus, Respondent's reliance on

defendants' Rule 55.27 motion for improper venue totally fails. (Brief for Respondent pg. 7, para second).

Respondent's single additional point arguing that venue is proper in Jackson County says nothing to negate relator's showing that Respondent failed to take jurisdiction over First Amended Petition and that defendants failed to file a proper motion or plead responsively in the manner and form prescribed by law.

B. Even without defendants waiving venue, venue is still proper in Boone County.

Relator did not address in his brief the actual propriety of venue on the merits because the question before this court is whether venue is waived for improper pleading and Respondent's failure to take jurisdiction. However, aside from the fact that defendants waived venue and Respondent failed to take jurisdiction over First Amended Petition, venue would still be proper in Boone County.

As stated supra, Respondent's Brief incorrectly argues the fundamental elements of venue. Nonetheless, to the extent this court would consider the question of proper venue, the elements of venue actually argues for Boone County and not against. For example: The language of §508.010.(6) is explicit: "In all tort actions the suit **may** be brought in the county where the cause of action accrued **regardless of the residence** of the parties". (emphasis relator's). Oxford Dictionary and Thesaurus, Oxford Press, 1996 defines regardless as 'without regard for or paying any attention to'. Missouri law interprets the term 'accrued' as 'occurred' i.e.: "at the place where the wrongful conduct causing injury or damages occurred". *State ex rel. Private Nursing Service v. Romines*

130 S.W.3d 28,29 (E.D. 2004). Although the parties agree that defendants' misrepresentations about the condition of the vehicle were made in Jackson County, the actual damage 'occurred' in Boone County where the vehicle broke down requiring extensive repairs. (A 3 - 4). Thus, both the actual damages – and the discovery of the misrepresentations – occurred in Boone County. Respondent should have paid no attention to the residence of the parties in determining venue as being in Boone County.

On point is *Sullenger v. Cooke Sales & Svc*, 646 S.W.2d 85 (banc, 1983). *Sullenger* involved sales negotiations in Audrain County where seller made certain misrepresentations to buyer regarding a tractor. Buyer later discovered the misrepresentations when tractor broke down in Lincoln County. Although seller argued venue was proper in Audrain County where the misrepresentations were made, this court held that "the misrepresentations did not fully ripen or vest until the tractor had been delivered to defendant, thus causing the substance of the tort to spill over into Lincoln County". Id. @ 89.

The identical fact situation exists here where misrepresentations were made in Jackson County by defendants who knew at the time the vehicle would be delivered to Boone County. Respondent makes the very same argument as seller in *Sullenger*, that because the alleged "wrongdoing" "occurred" in Jackson County that venue would be proper there. (Brief for Respondent, pg. 9). However, applying this court's analysis in *Sullenger* the substance of the alleged misrepresentations followed the vehicle to Boone County where they ripened and vested when the vehicle broke down in Boone County

requiring extensive repair in Boone County to bring the vehicle back to the actual condition that it was represented to be in the first place.

Sullenger's spill-over analysis is sound, particularly in the instant case, for two important reasons. 1) Implicit in the parties negotiations, is that defendants were essentially representing to relator what the condition of the vehicle would be when returned to Boone County, and 2) relator was relying that when he got the vehicle back to Boone County its condition would be as represented.

Also, Respondent's reliance on the element of 'when a case is brought' is misplaced in that it further militates for Boone County and not against. Although Respondent argues well that venue is determined by statute and determined when a case is brought (Brief for Respondent, pg. 7-9), Respondent overlooks a fundamental rule and an issue of fact bearing on the question of when a case is 'brought'. As for the rule, the case of *State ex rel Linthicum v. Calvin* 5 S.W. 3d. 855 (banc, 2001) holds essentially that amended petitions must be considered in determining when a case is brought. As for the issue of fact, the same misrepresentation and damages were just as well pled in the original petition(A 3 - 8) as in the amended petition A 11 - 17). Thus, applying the analysis in *Sullenger*, the misrepresentations and damages ripened and vested in Boone County even when the original petition was brought against original defendants.

As such, contrary to Respondent's argument in support of her additional point relied on, venue was proper in Boone County even absent defendants' failure to plead in the manner and form prescribed by law, and absent Respondent's failure to take

jurisdiction over First Amended Petition. Not to mention convenience of litigation where the vehicle was in Boone County, repairs were done in Boone County, and the damage witnesses were in Boone County.

C. Respondent's response to mandamus is improper.

Brief for Respondent is not well taken. First, the brief does not respond to relator's specific point as required by Rule 84.04(f). As such, Respondent's additional point relied on fails to oppose relator's points and arguments in support thereof. Second, Respondent's standard of review citations involve Writ proceedings which were appealed from lower courts and does not apply here where the instant petition is an original mandamus proceeding. Finally, Respondent's single (or additional) point relied on is more of an argument in support of prohibition than an argument opposing mandamus.

The petition now before this court is a petition in mandamus. Mandamus lies to compel a court to do that which the court was obligated by law to do. *State ex rel Schnucks Markets v. Koehr* 859 S.W.2d 696 (banc, 1993). Here, relator is asking this court to compel Respondent to take jurisdiction over relator's First Amended Petition which she was obligated to do by § 509.490 RSMo., and Rule 55.33(a).

Prohibition lies to test whether a judge is acting in excess of [their] jurisdiction because of improper venue. *State ex rel. Reedcraft Mfr. Inc., v. Honorable Greg Kays* 967 S.W.2d 703, 704 (S.D. 1998). If venue is improper in the county where the action is brought, prohibition lies to bar the trial court from taking further action, other than to transfer the case to the county of proper venue. *Id.*

In light of *Reedcraft Mfr.* Respondent's argument would only apply here had she proceeded on relator's claim in Boone County in excess of her jurisdiction and defendants were petitioning to prohibit further proceeding. Since Respondent didn't take jurisdiction, the argument is incongruous as an argument opposing mandamus.

Instead of arguing prohibition, Respondent should be showing this court why she failed her obligation of taking jurisdiction over First Amended Petition and failed here obligation to consider the fact that defendants did not plead responsively to First Amended Petition as required by Rule 55.33(a). Those would be proper arguments directed to relator's points in mandamus. Thus, Respondent's entire argument fails because it does not respond to relator's specific points either in form or substance.

CONCLUSION

For all the aforesaid reasons, Respondent has: 1) failed to show that relator is not entitled to an order directing Respondent to set aside all orders she entered below and to take jurisdiction over relator's First Amended Petition and to proceed thereon in Boone County; and 2) failed to show that relator is not entitled to an order directing Respondent to enter a judgement of default against defendants for their failure to plead in the manner and form prescribed by law.

WHEREFORE, this court's permanent order should issue directing Respondent to set aside all orders she entered below and to take jurisdiction over relator's First Amended Petition and to proceed thereon in Boone County; and to enter an order directing Respondent to enter a judgement of default against defendants.

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CERTIFICATE OF COMPLIANCE, ANTI VIRUS, SERVICE

The undersigned certifies that:

1. Appellant's Brief complies with the limitations contained in Rule 84.06(b) and that

the word count, exclusive of the certificates, and signature block, is 2801;

2. The diskette filed with this brief pursuant to rule 84.06(g) has been scanned for viruses and is virus free; and

3. On this 20TH day of September, 2005 relator served a copy of the foregoing brief

on The Honorable Ellen S. Roper, and Mr. Robert D. Kingsland by placing a copy in the mail, first class, postage prepaid and addressed to the last address of record for each named

recipient.

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